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IN THE

Supreme Court of the United States

October Term, 1976
No. 76-1671

UNITED STATES OF AMERICA,

Petitioner,

vs.

FRANK DEMARCO, JR.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION.

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Opinions Below

The opinion of the District Court (Pet. App. 7a-23a)[1] is reported at 401 F. Supp. 505 (C.D. Cal.). The opinion of the United States Court of Appeals for the Ninth Circuit (Pet. App. 1a-6a), affirming the decision of the District Court, is reported at 550 F. 2d 1224.

Jurisdiction

The jurisdictional requisites are adequately set forth in the Petition for Writ of Certiorari. (Pet. 1)

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[1]The following abbreviations are used in this Brief: "Pet." for Petition for Writ of Certiorari; and "Pet. App." for Appendix of the Petition.

Question Presented

Whether it is an abuse of discretion for a District Court to dismiss an indictment pursuant to the principles of *Blackledge v. Perry*, 417 U.S. 21 (1974) and the court's inherent power to supervise the administration of criminal justice when a prosecutor, in an effort to prevent a defendant from exercising his statutory venue right, twice threatened that if the defendant exercised that right, the charges against him would be increased; and after that right was exercised, the Government filed an additional charge which was based upon conduct known by the prosecutor prior to the return of the original indictment?

Counterstatement of the Case

This case involves a dismissal of a one-count indictment by the District Court for the Central District of California, which found that the prosecutor for the Watergate Special Prosecution Force ("WSPF"), in an attempt to prevent the defendant/respondent, Frank DeMarco, Jr. from availing himself of a District Court order granting a change of venue, twice threatened to charge him with an additional offense. The first threat was made after the District Court for the District of Columbia granted Mr. DeMarco's motion to change venue; the second threat was made after the WSPF filed a Petition for Writ of Mandamus with the Court of Appeals for the District of Columbia seeking to reverse the order granting the change of venue. After the case was transferred to the Federal District Court in Los Angeles, the WSPF obtained the threatened indictment. The factual basis for the new indictment had arisen out of the same course of conduct as the originally charged offenses, and was

known to the Government prior to the initiation of the original prosecution. In fact, the District of Columbia grand jury that returned the original indictment was presented with evidence of alleged conduct which resulted in the second indictment. (Pet. 4; Pet. App. 4a)

In dismissing this new indictment, the District Court found:

> "that the defendant at the time of the telephone conversations was deliberately placed on notice that if he exercised his statutory venue rights, the prosecution threatened to respond by 'upping the ante.'" (Pet. App. 11a)

The dismissal by the District Court of this new indictment was pursuant to the principles of *Blackledge v. Perry*, 417 U.S. 21 (1974) and the court's supervisory power over the administration of criminal justice.[2]

Many of the factual assertions upon which Petitioner's claims of lower court error are predicated do not find support in the record and are misstatements of the findings and conclusions of the District and Circuit Courts. In order to put the issues in their proper factual perspective, we set forth the facts as adduced by the District Court and affirmed by the Court of Appeals.

Statement of Facts

The case at bench arose from an investigation into the preparation of President Nixon's 1969 income tax returns in which a deduction was claimed for a gift

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[2]The original indictment, after transfer to California, was also dismissed after three weeks of trial because of intentional Government misconduct. *See* 407 F. Supp. 107 (C.D. Cal. 1975).

of certain papers to the United States. Mr. DeMarco and Ralph Newman were indicted by a grand jury for the District of Columbia in February, 1975, for violations of 18 U.S.C. §§ 371, 1001 and 1505. Count I charged Messrs. DeMarco and Newman with conspiring to defraud the United States; Count III charged Mr. DeMarco with making false statements to IRS Agents Lonegro and Calogero on January 18, 1974 in the District of Columbia; and Count IV charged Mr. DeMarco with obstructing proceedings of the Joint Committee on Internal Revenue Taxation ("Joint Committee"). Counts III and IV were based upon an interview of Mr. DeMarco by the IRS Agents and the Joint Committee in which the Agents took extensive notes. Agent Calogero had also participated in an interview of Mr. DeMarco in California on February 22, 1974, at which time the same operative questions as those involved in the January 18 interview were asked and the same answers given.

Messrs. DeMarco and Newman each filed timely motions pursuant to 18 U.S.C. § 3237(b), whereby each sought a change of venue to the district of their respective residences.[3]

The prosecutor vigorously opposed transfer. After hearing, on April 16, 1975, Judge Gasch granted each of the motions of Messrs. DeMarco and Newman to transfer the case to their respective residences. Thus, Mr. DeMarco's case was transferred to the Central District *of* California, and Mr. Newman's to the North-

[3]Authority to transfer Count III (§ 1001) was not bottomed upon § 3237(b), but upon Federal Rules of Criminal Procedure 21(b), *i.e.*, to insure the convenience of the parties and witnesses. (Pet. App. 9a) No motion for severance was ever filed on behalf of either Mr. DeMarco or Mr. Newman.

ern District of Illinois. (Pet. App. 9a) The prosecutor's motion for reconsideration before Judge Gasch was denied, and the prosecutor, on May 6, 1975, then petitioned the United States Court of Appeals for the District of Columbia for mandamus, which petition was ultimately denied on July 9, 1975. (Pet. 6-7)

On April 17, 1975, the day *after* Judge Gasch had granted Mr. DeMarco's motion, his counsel Mr. McNelis received a telephone call from the WSPF prosecutor—Jay Horowitz. Horowitz stated that if Mr. DeMarco acted upon the venue change and went to trial in California, the Government would consider bringing more counts against him and restructuring the case. (Pet. App. 2a, 9a) Since the prosecutor was fighting strenuously to avoid the resulting severance, Horowitz stated that there would be no initiation of new charges if Mr. DeMarco would agree to a joint trial with Newman. (Pet. App. 27a) Mr. DeMarco refused.

On July 9, 1975, after the mandamus petition in the D.C. Circuit was denied, Horowitz informed Mr. McNelis that if Mr. DeMarco did not agree to be tried jointly with Newman in Chicago, he would be indicted for false statements made to IRS Agents in Los Angeles on February 22, 1974. (Pet. App. 9a)

On July 29, one day following Mr. DeMarco's arraignment on the transferred indictment from the District of Columbia, the prosecutor obtained an indictment from the grand jury in the Central District of California (No. 75-1188, hereafter "California indictment"), which alleged that Mr. DeMarco made false statements to the IRS Agents in the interview conducted in Los Angeles on February 22.

Both courts below found the charges in the two indictments predicated upon the same operative facts. (Pet. App. 3a, 4a, 22a) The same IRS Agent participated in both interviews; the same questions were asked and same answers given in both interviews; Mr. DeMarco's statement in California was actually submitted to the District of Columbia grand jury; and it was offered in evidence at the trial.

Trial and Appellate Court Opinions

The District Court dismissed the indictment, holding, *inter alia*, that the Government's threats to file the additional charge were made for the purpose of deterring Mr. DeMarco from exercising his statutory right to venue change. (Pet. App. 10a) Contrary to the Government's suggestions in the Petition (Pet. 7) and its incomplete presentation of the evidence and representations which were before the District Court, the District Court found that the threats to indict were made *after* the venue motions had been filed and granted, in order to impose upon the defendant "a heavier burden if he should assert his statutory rights" (Pet. App. 18a) and not during "pending litigation" as part of a compromise. (Pet. App. 10a)

The District Court did not, as alleged in the Petition (Pet. 9), find consistency in the affidavits submitted before it relative to the telephone conversations. While it found no inconsistency between the "renditions of these conversations" (Pet. App. 10a) it did find that "at the time of the telephone conversations, the government deliberately used the threat of a new indictment in California to deter the defendant from exercising his statutory rights." (*Id.*) Dismissal was not only

upon due process considerations, but also upon the court's supervisory role over the administration of criminal justice. (Pet. App. 7a, 16a)

Focusing upon the choice confronting Mr. DeMarco when the threats were made, the District Court held:

> ". . . Mr. DeMarco was entitled to pursue his statutory venue rights free of the apprehension that the government would retaliate by filing additional charges. [Citations omitted] He was entitled to pursue those rights free of threats and intimidation, even from threats presented in a non-threatening tone." (Pet. App. 13a)

Furthermore, the District Court did not hold that the Government could never restructure its case when circumstances changed, as contended by Petitioner. (Pet. 14) Rather, it only held that if the Government "impermissively uses its charging power as a bargaining tool . . . its power to bring new charges will be appropriately confined." (Pet. App. 14a)

The Court of Appeals found no reason to disturb the District Court's findings of fact and conclusions of law. It affirmed the decision below, holding that:

> "*Blackledge* and [*North Carolina v.*] *Pearce* each establish a prophylactic rule imposing limits upon prosecutorial discretion in seeking new indictments or in conducting retrials when such actions carry with them the opportunity of retaliation for a defendant's exercise of a statutory right that has due-process implications." (Pet. App. 6a)

The Court of Appeals concurred with the District Court's findings that "the factual nucleus of both indictments was the same" (Pet. App. 4a), and that "the

California statement was a duplicate of DeMarco's statement in the District of Columbia to the Joint Committee, upon which the original indictment was, in part, based." (*Id.*) In response to the Government's argument that it was "equitably restrained" from prosecuting Mr. DeMarco in California until the venue change was granted and accepted, the Court of Appeals rejected any notion that this was a "major change" in circumstances which operated to distinguish *Blackledge* from the case before it. Just as the District Court had found that the Government's "policy" of not maintaining simultaneous prosecutions was an insufficient after-the-fact justification for the new prosecution, revealed only *after* the original indictment had been transferred (Pet. App. 16a), the Court of Appeals held that the prosecutor's purported justification was "unsupported by the record." (Pet. App. 4a)

> "The only 'major change' was severance resulting from DeMarco's exercise of his statutory venue right. The Government cannot rely on the exercise of that right to defeat *Blackledge*.
>
> * * *
>
> "Here, as in *Blackledge*, a prosecutor 'has considerable stake in discouraging' defendants from exercising their venue rights when the effect 'will clearly require increased expenditures of prosecutorial resources' because the prosecutor loses the advantages of trying alleged conspirators together and must also conduct two trials in different parts of the country. [Citation omitted]." (Pet. App. 4a-6a)

The Court of Appeals' conclusion was that "it was not constitutionally permissible for the Government to threaten to 'up the ante' to discourage DeMarco from exercising his venue right." (Pet. App. 6a)

ARGUMENT

This Court Should Not Grant a Writ of Certiorari to Entertain Twice Rejected Factual Assertions Where the District and Appellate Courts' Decisions Are Supported by Substantial Evidence and Are in Accord With Other Federal Decisions.

Two courts in the case at bench have ruled that prosecutorial conduct created, at minimum, the "appearance of vindictiveness" which *Blackledge* condemns. These decisions are consistent with the decisions of the various circuits. *See, e.g. United States v. Ruesga-Martinez,* 534 F. 2d 1367 (9th Cir. 1976); *Hayes v. Cowan,* 547 F. 2d 42 (6th Cir. 1976), *cert. granted sub nom. Bordenkircher v. Hayes,* ..... U.S. ..... (June 6, 1977); *United States v. Johnson,* 537 F. 2d 1170 (4th Cir. 1976); *United States v. Jamison,* 505 F. 2d 407 (D.C. Cir. 1974); *United States v. Gerard,* 491 F. 2d 1300 (9th Cir. 1974). The factual determinations and legal conclusions of the District Court, based upon a full presentation of evidence not appearing in the Petition, and affirmation of those determinations and conclusions by the Court of Appeals should not be further reviewed by this Court. It is a settled rule that this Court "cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *Graver Tank & Mfg. Co. v. Linde Air Products Co.,* 336 U.S. 271, 275 (1949).

A. The Filing of the California Indictment Was the Prosecutor's Retaliation for Mr. DeMarco's Refusal to Accede to a Waiver of His Venue Rights.

Where the Government's knowledge of a defendant's conduct allows the Government to charge multiple offenses, or offenses of differing severity, and the Government opts not to charge all offenses, or the most severe, "upping the ante" upon retrial by charging additional or more serious offenses is proscribed by principles of due process. *Blackledge v. Perry,* 417 U.S. 21 (1974); *United States v. Jamison,* 505 F. 2d 407 (D.C. Cir. 1974). Prosecutorial charging decisions are particularly circumscribed where an increase or substitution of charges is motivated, even in appearance, by a defendant's refusal to waive a procedural or constitutional right. *United States v. Ruesga-Martinez,* 534 F. 2d 1367 (9th Cir. 1976). The operative fact which condemns institution of additional or more serious charges is a finding that these new charges are based upon conduct known by the Government to have criminal repercussions when the initial charges were brought. *United States v. Johnson,* 537 F. 2d 1170, 1172-73 (4th Cir. 1976). Only where an event occurs between the first and second indictment which on its face negatives the appearance of retaliation, will a charge increase be condoned. After-the-fact rationalizations to purportedly justify the additional charge cannot overcome governmental action which, on its face, smacks of vindictiveness or carries the appearance of retaliation; for it is the *appearance* of

vindictiveness as well as actual retaliation which the courts proscribe. *Blackledge v. Perry*, 417 U.S. at 27-28. *See also United States v. Jamison, supra*, 505 F. 2d at 415-416; *United States v. Johnson, supra*, 537 F. 2d at 1173.

Petitioner admits that the February 22 interview not only would have given rise to a criminal prosecution, and that it was aware of same, but also that it was presented as evidence to the District of Columbia grand jury which returned the original indictment against Mr. DeMarco. (Pet. 4)

The Government chooses to downplay this pivotal fact, instead arguing that the change of venue somehow freed it from the principles of *Blackledge*. However, the facts are otherwise. Both courts below rejected Petitioner's assertion that the change of venue and severance was " 'a major change legitimately bearing on the prosecution function' which justifies distinguishing *Blackledge*. . . ." (Pet. App. 4a, 16a, 18a)

This Court in *Blackledge* noted the type of "change" in circumstances which would permit increased charges, *viz.* where the state "had shown that it would have been *impossible* to proceed on the more serious charge at the outset. . . ." (417 U.S. at 29 n. 7; emphasis added)[4] In the case at bench, however, no constitu-

[4]The example there used was *Diaz v. United States*, 223 U.S. 442 (1931), in which after the defendant had been tried and convicted for assault and battery, the assault victim died. The subsequent trial and conviction for homicide was constitutionally proper "since the crime of homicide was not complete until after the victim's death." (417 U.S. at 29 n. 7)

tional or statutory barrier prevented the Government from initiating a criminal prosecution based upon the February 22 interview on or before the time the District of Columbia indictment was returned. No substantive factual change or discovery of evidence intervened between the return of the District of Columbia indictment and the California indictment which could explain the Government's belated attempt to prosecute. As the Court of Appeals found:

> "The only 'major change' was severance resulting from DeMarco's exercise of his statutory venue right. The Government cannot rely on the exercise of that right to defeat *Blackledge*." (Pet. App. 4a)

Furthermore, the record belies Petitioner's claim that the initial decision not to indict Mr. DeMarco in California was based upon an "equitable restraint" which ceased upon transfer of the case to California. (Pet. 13) Both courts below rightfully rejected this *ipse dixit* phrase "equitable restraint." The District Court found it to have been an after-the-fact invention which, in actuality, penalized the defendant for his transfer of one of the charges from the District of Columbia. (Pet. App. 16a) Moreover, the logic of this contention

The court in *United States v. Jamison, supra*, also posted a situation which might justify increased charges, *i.e.*, where the Government was unaware of the existence of the more serious crime when it originally indicted the defendant. (505 F. 2d at 416-417) *Cf. United States v. Preciado-Gomez*, 529 F. 2d 935 (9th Cir.), *cert. denied*, 425 U.S. 953 (1976).

is defeated by Petitioner's own arguments before this Court. Consider Petitioner's argument that the February 22 interview did not give rise to a charge in the District of Columbia because venue would have been improper. Thus, the prosecution did not institute proceedings in California because to do so "would have subjected DeMarco to multi-district, pre-trial litigation at opposite ends of the continent." (Pet. 12-13) From this premise, Petitioner argues the change of venue to California removed the alleged "equitable restraint" upon proceeding in California. (Pet. 14)

Petitioner earlier argued, however, that venue considerations *were not the major concern* when it sought to reverse the venue change. Rather, it was the fact of *severance* which the Government was seeking to avoid (Pet. 6) and the Government would have consented "to transfer of the entire case to one district." (Pet. 7) Assuming the accuracy of the Government's representation, when the case was transferred to California the "equitable restraint" precluding prosecution of Mr. DeMarco for the February 22 interview would have no longer existed, since venue would properly lie in California. However, per the Government's own representations, *even had the entire action been transferred to California, the Government would still not have proffered a charge based upon the February 22 interview*. The prosecutor averred that the four charges included in the District of Columbia indictment would

have been the *only* ones upon which a trial in any other jurisdiction would have occurred.[5]

In reality "equitable restraint" had *nothing* to do with the Government's choice not to prosecute Mr. DeMarco upon the February 22 interview.[6] A joint trial in California of Messrs. DeMarco and Newman would have withdrawn all "equitable restraint" upon prosecuting Mr. DeMarco for statements made in California; but no such prosecution would have occurred per representations of Horowitz. The additional charge against Dr. DeMarco was brought only in retaliation for his successful severance, and for his requiring "increased expenditures of prosecutorial resources." *Blackledge v. Perry, supra,* 417 U.S. at 27.

B. The Venue Bargaining Tactics by the Government in the Case at Bench Are Far Removed From the Examples Postulated by the Petitioner.

Petitioner sets forth its "parade of horribles" (Pet. 16-17) regarding common trial and pretrial situations

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[5]Horowitz affidavit, ¶11:

". . . Counsel had stated to me that the motions for change of venue had been filed not only for purposes of transferring these cases out of the District of Columbia, but also for purposes of gaining a severence. *I stated that the government would agree to a joint trial out of the District of Columbia, but only on the condition that it were a joint trial of the charges then pending.*" (Pet. App. 27a; emphasis added.)

[6]Rather than from benevolent motives, it is far more likely that a simultaneous indictment was not sought in California by the Government while the District of Columbia indictment was pending for fear that Mr. DeMarco could successfully seek consolidation of the cases in his home district—Los Angeles. There was no legal impediment to simultaneous prosecutions in different districts. *Cf. United States v. United States Gypsum Co.*, 383 F. Supp. 462, 470 (W.D. Pa. 1974); *United States v. Bowles*, 183 F. Supp. 237, 242-243 (D.Me. 1958).

purportedly analogous to the facts herein, and suggests that these prosecutorial practices would be impermissible if the decision in the case at bench were upheld. But the examples of a successful defense motion for severance thus allowing the Government to introduce evidence excluded from a joint trial or a defendant's calling of a character witness thus allowing the prosecutor to introduce otherwise inadmissible evidence as posited by Petitioner are far removed from the facts here. In the Petitioner's examples, the prosecution has *absolutely no option* to do what it desires prior to affirmative action by the defendant; the Government's hands are tied until the defendants are severed or character witnesses testify. No conscious prosecutorial choice *not* to exercise the option ever exists; the event itself makes the impossible possible. *See Diaz v. United States*, 223 U.S. 442 (1931). However, in this case the Government *always* had the option to charge Mr. DeMarco in California upon the February 22 interview. Once this fact appears, the principles of *Blackledge* come into play.

To the Government's credit, it does not attempt to equate the venue bargaining activity herein with plea bargaining. *See Hayes v. Cowan*, 547 F. 2d 42 (6th Cir. 1976), *cert. granted sub nom. Bordenkircher v. Hayes*, ... U.S. .... (June 6, 1977). As found by the District Court:

> ". . . [W]hile plea bargaining may be necessary for the effective administration of criminal justice, venue bargaining is hardly a necessary component of the prosecutor's arsenal. Indeed the venue safeguards of 18 U.S.C. § 3237(b) would be thoroughly undermined by a contrary decision. Thus the

> appropriate analogy to be drawn from the facts of this case is found in *Blackledge*, not in *Brady* [*v. United States*, 397 U.S. 742 (1970)]." (Pet. App. 15a)

Conclusion

The Petition requests this Court to reconsider factual findings and legal conclusions made by the District Court and approved by the Court of Appeals. That task is not one that should be undertaken by this Court. The holdings of both the District Court and Court of Appeals are in accord with the applicable prevailing law and compelled by the factual record before those courts. Petitioner has not demonstrated, as it cannot, any meritorious reason why its Petition should be granted.

For the foregoing reasons, respondent submits that the Petition for Certiorari should be denied.

DATED: June 28, 1977.

Respectfully submitted,

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